No. 86-112

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1986

DIANE L. MAURIELLO,

Petitioner,

vs.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO diMAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended, a doctoral student dismissed by a state-supported university was the "prevailing party" for purposes of awarding attorney's fees where following the jury's findings of procedural and substantive due process violations in the hearing procedures leading to the student's dismissal, the District Court entered a permanent injunction directing new hearing procedures which were held prior to the Court of Appeals' reversal that no constitutional violations occurred based upon this Court's intervening decision in *Regents of the University of Michigan v. Ewing*, 474 U.S. ____, 88 L. Ed. 2d 523 (1985)?

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No.

In The

Supreme Court of the United States

October Term, 1986

DIANE L. MAURIELLO,

Petitioner,

vs.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO diMAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The judgment of the United States District Court for the District of New Jersey entered in petitioner's favor awarding attorney's fees in the amount of $60,717.50 and additional costs in the amount of $371.56 is set forth in the order entered on the docket May 22, 1985. The District Court's opinion concerning petitioner's motion to fix an award of attorneys' fees is unreported. The opinion of the United States Court of Appeals for the Third Circuit reversing the judgment of the District Court is unreported.

The judgment of the United States District Court for the District of New Jersey entered in petitioner's favor on the merits after the jury duly rendered its verdict is set forth in the judgment entered on the docket August 13, 1984. The District Court's rulings on respondents' post-trial motions and granting of permanent injunctive relief are set forth in the order entered on the docket August 28, 1984. The opinion of the United States Court of Appeals for the Third Circuit vacating the judgment of the District Court on the merits and entering judgment in respondents' favor is reported at 781 F.2d 46 (3d Cir. 1986). The Court of Appeals denied rehearing en banc by order dated February 18, 1986. Following reversal on the merits, petitioner filed a petition for certiorari, No. 85-1921, on May 19, 1986, 54 U.S.L.W. 3848 (July 24, 1986).

The judgment and orders of the District Court, the opinion of the District Court and the opinions of the Court of Appeals appear in the Appendix, *infra*.

STATEMENT OF JURISDICTION

On April 25, 1986, the Court of Appeals entered judgment reversing the judgment of the District Court awarding attorney's fees to petitioner (26a). This Court has jurisdiction to review the

judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provision pertains to this case:

(1) 42 U.S.C. § 1988:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or any civil action or proceeding, by or on behalf of the United States of America, to enforce, or

> charging a violation of, a provision of the United States Internal Revenue Code or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioner, Diane Mauriello, matriculated for her Ph.D. degree in microbiology for 5½ years in the Graduate School of Biomedical Sciences at respondent, the University of Medicine & Dentistry of New Jersey. On February 4, 1983, the Graduate Committee of the Department of Microbiology dismissed Ms. Mauriello from the Ph.D. program without any reason being given and without any evaluation by the Graduate Committee of Ms. Mauriello's academic record or the quality of her doctoral thesis research.

Ms. Mauriello sued respondents in the United States District Court for the District of New Jersey pursuant to 28 U.S.C. §§ 1331 and 1343. Ms. Mauriello sought relief under the Constitution of the United States and 42 U.S.C. § 1983 for her arbitrary and capricious dismissal from the Ph.D. program in violation of her procedural and substantive due process rights.

Following a five day jury trial, the District Court Judge, the Honorable Frederick B. Lacey, submitted the following questions to the jury on special interrogatories:

> (i) Whether respondents did not give Ms. Mauriello procedural due process in connection with her dismissal;
>
> (ii) Whether Ms. Mauriello proved that her academic

performance was not evaluated prior to her being dismissed; and

(iii) Whether Ms. Mauriello proved that her dismissal from the Ph.D. program was arbitrary and capricious.

The jury answered "yes" to each of the special interrogatories and awarded $50,015 in damages to Ms. Mauriello. The District Court entered judgment upon the jury verdict and awarded Ms. Mauriello costs and attorney's fees (27a).

Respondents filed various post-trial motions, all of which the District Court denied except respondents' motion for a new trial which the District Court granted unless Ms. Mauriello consented to remit the amount of $40,000 (30a). On August 31, 1984, Ms. Mauriello filed a consent to remit the judgment to $10,015.

On August 28, 1984 the District Court entered an order on respondents' post-trial motions and granted permanent injunctive relief to Ms. Mauriello (28a-35a). The District Court ordered the formation of an *ad hoc* committee within respondent University to meet with Ms. Mauriello to review her thesis research material and to make a recommendation on the quality of Ms. Mauriello's thesis research material (30a-34a). Respondents moved to stay the injunction pending appeal to the Court of Appeals for the Third Circuit. The District Court denied the stay and respondents sought no stay in the Court of Appeals (35a).

Respondents, however, appealed from the District Court's judgment on the merits entered on the docket August 13, 1984 and from the District Court's order and injunction entered on the docket August 28, 1984.

On September 10, 1984, Ms. Mauriello filed a verified bill

of costs and disbursements and a motion pursuant to 42 U.S.C. § 1988 to fix the amount of attorney's fees awarded by the District Court. By order entered on the docket May 22, 1985, the District Court awarded Ms. Mauriello attorney's fees in the amount of $60,717.50 and additional costs in the amount of $371.56 for a total award of $61,089.06 (1a). On June 11, 1985, Ms. Mauriello filed a notice of appeal from the order awarding attorney's fees and respondents filed a notice of cross-appeal on June 14, 1985.

On appeal from the District Court'a judgment and order denying respondents' post-t.ial motions and entering injunctive relief, the United States Court of Appeals for the Third Circuit vacated the judgment of the District Court and entered judgment for respondents. 781 F.2d 46 (3d Cir. 1986) (49a). On May 19, 1986, Ms. Mauriello filed a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit seeking this Court's review of the Court of Appeals' reversal on the merits. 54 U.S.L.W. 3848 (July 24, 1986).

During pendency of the appeal on the merits, Ms. Mauriello presented her thesis research material to the *ad hoc* committee. Thereafter, the *ad hoc* committee reported its recommendation. As such, under the provisions of the District Court's injunction, counsel for the parties were to meet to mutually determine Ms. Mauriello's future course of study as a doctoral candidate (34a-35a). However, by order entered on the docket February 5, 1986, the District Court stayed implementation of that portion of its injunctive order pending issuance of the mandate by the Court of Appeals (50a-51a).

On April 25, 1986, the Court of Appeals reversed the order awarding attorney's fees on the grounds that because of its holding in the related merits appeal, Ms. Mauriello failed to prove a *prima facie* case and, thus, was not the prevailing party within the meaning of 42 U.S.C. § 1988 (26a).

REASONS FOR GRANTING THE WRIT

In reversing the award of attorney's fees to Ms. Mauriello, the Court of Appeals reached a conclusion in conflict with a decision of the Court of Appeals for the First Circuit. *Coalition for Basic Human Needs v. King,* 691 F.2d 597 (1st Cir. 1982). In holding that Ms. Mauriello was not the "prevailing party" for purposes of a fee award under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (the "Act"), the Court of Appeals disregarded the benefits Ms. Mauriello achieved under the permanent injunction issued by the District Court.

In the related merits appeal the Court of Appeals held that the District Court's injunction erroneously issued as a matter of law based upon its interpretation of this Court's intervening decision in *Regents of the University of Michigan v. Ewing,* 474 U.S. ____, 88 L. Ed. 2d 523 (1985) (43a-49a). The Court of Appeals' application of *Ewing* is an outcome-determinative change of law subsequent to the issuance of the permanent injunction. As such, it should not be held to vitiate the significance of the injunctive relief achieved by Ms. Mauriello for purposes of awarding fees under the Act. The application of a new legal pronouncement in *Ewing* cannot change the essential fact that Ms. Mauriello "prevailed" in obtaining some of the benefits she sought in bringing suit as she received the new hearing on her thesis research material which she sought.

In her civil rights complaint, Ms. Mauriello claimed that her procedural and substantive due process rights were violated by the manner in which she was dismissed. Pursuant to the jury's finding that defendants violated Ms. Mauriello's substantive and procedural due process rights, the District Court ordered that Ms. Mauriello meet with an *ad hoc* committee to present her thesis research materials. By having met with the *ad hoc* committee as

ordered by the District Court, Ms. Mauriello obtained a benefit for which she instituted suit prior to the Court of Appeals' holding that she was not legally entitled to the procedures awarded her. Consequently, the issue of a new hearing was moot at the time the Court of Appeals held that the District Court issued the injunction in error. The Court of Appeals' decision cannot change the fact that as Ms. Mauriello already had received the fair and impartial hearing which she had requested, she "accomplished the objectives of [her] litigation". *NAACP v. Bell,* 448 F. Supp. 1164, 1166 (D.D.C.), *cert. denied,* 447 U.S. 922 (1978).

In *Hanrahan v. Hampton,* 446 U.S. 754 (1980) (per curiam), this Court stated that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits,' " and that the basic question was whether there had been entry of an order "that determines the substantial rights of the parties." 446 U.S. at 756-58. The injunctive relief obtained by Ms. Mauriello was predicated on an adjudication of the substantial rights of the parties and thus is distinguishable from interim relief that merely forestalls injury pending final consideration on the merits. *See Davis v. City of Ennis,* 520 F. Supp. 262, 265-66 (N.D. Tex. 1981) (per curiam) (three-judge court).

A decision reached by the Court of Appeals for the First Circuit conflicts with the conclusion reached by the Court of Appeals in the instant case and by the Courts of Appeals for the Fifth and Eleventh Circuits. *Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center,* 765 F.2d 1278 (5th Cir.), *on petition for reh'g,* 777 F.2d 329 (5th Cir. 1985); *Doe v. Busbee,* 684 F.2d 1375 (11th Cir. 1982). In *Coalition for Basic Human Needs v. King,* 691 F.2d 597 (1st Cir. 1982), the Court of Appeals for the First Circuit held that plaintiffs were "prevailing parties" entitled to an award of attorney's fees under the Act. There, plaintiffs in a civil rights action obtained an

injunction pending appeal requiring defendants to resume payments under the Aid to Families with Dependent Children and the state General Relief programs. Before the injunction became effective, the state legislature passed a full budget mooting the controversy. In upholding plaintiffs' entitlement to attorney's fees, the Court of Appeals stated that the preliminary injunctive relief was akin to a "final" decision determining the "substantial rights" of the parties.

Under the standard for determining whether a plaintiff is the "prevailing party", Ms. Mauriello prevailed "on an important matter in the course of litigation. . . ." *NAACP v. Wilmington Medical Centers Inc.*, 689 F.2d 1161, 1167 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983), citing Senate Report No. 1011, 94th Cong., 2nd Sess. 5, 1976 U.S. Code Cong. and Ad. News 5908, 5912. Ms. Mauriello's success in receiving a new hearing on her thesis research material was a moot controversy at the time the Court of Appeals reversed the judgment of the District Court. That reversal cannot take away what already had been accomplished.

In holding that Ms. Mauriello was not the prevailing party, the Court of Appeals not only adopted a position contrary to the Court of Appeals for the First Circuit, but adopted a position contrary to a prior published decision rendered by it. In *Bagby v. Beal*, 606 F.2d 411 (3d Cir. 1979), plaintiff brought suit under § 1983 alleging she was suspended from employment in violation of her procedural due process rights. The District Court entered declaratory judgment finding a violation of plaintiff's due process rights and ordered that she be given a new hearing with specified procedures. The hearing was held and plaintiff's suspension from employment was found to have been justified. On appeal, the Court of Appeals for the Third Circuit held the case to be moot, but affirmed the District Court's order awarding attorney's fees.

It is respectfully submitted that to accomplish the salutory purpose of having "private attorneys general" in civil rights lawsuits, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), entitlement to attorney's fees should not be divested because of an intervening change of case law where a benefit sought by the litigation has been obtained and implemented. Public policy encourages vindication of constitutional rights. *City of Riverside v. Rivera*, ____ U.S. ____, 54 U.S.L.W. 4845, 4849 (June 27, 1986). Yet, it is gainsay that often such rights are the subject of controversy and unsettled law.

In order to ensure that lawyers would be willing to represent persons with non-frivolous civil rights grievances in unchartered areas of constitutional law, attorney's compensation should be upheld where a benefit has been both achieved and implemented, although the constitutional entitlement to such benefit subsequently is determined not to exist. Safeguards exist to protect defendants against paying fee awards where defendants are successful on appeal. Defendants may move to stay the district court's injunctive relief, as was done here. If stay of the injunction is denied, defendants may seek a stay in the Court of Appeals. Fed. R. App. P. 8. In this case, respondents failed to seek a stay in the Court of Appeals.

It is respectfully submitted that the prior decision of the Court of Appeals for the Third Circuit in *Bagby v. Beal* and that of the Court of Appeals for the First Circuit are correct in determining whether a plaintiff qualifies as a "prevailing party" for purposes of attorney's fees awards where the plaintiff has obtained the essential relief which she sought and which relief has become moot at the time a decision on appeal is reached.

CONCLUSION

For the foregoing reasons stated, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Dated: July 23, 1986

Respectfully submitted,

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APPENDIX A—ORDER OF THE DISTRICT COURT ENTERED ON THE DOCKET MAY 22, 1985

UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW JERSEY

Civil Action No. 83-1569

Hon. Frederick B. Lacey
United States District Judge

DIANE L MAURIELLO,

Plaintiff,

-vs-

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, et al.,

Defendants.

O R D E R

This matter having come before the court on the motion of plaintiff for an order fixing an award of attorneys' fees, and the court having considered the submissions of counsel and the arguments made before the court on November 26, 1984, and the parties having agreed on an award of costs in the amount of $371.56,

It is on this 22nd day of May, 1985 O R D E R E D that a reasonable attorneys' fee be awarded in the amount of $60,717.50, and costs in the amount of $371.56 be allowed, for

Appendix A

a total award of $61,089.06 in reasonable attorneys' fees and costs, in accordance with an opinion filed this date.

s/ Frederick B. Lacey
Hon. Frederick B. Lacey
United States District Judge

APPENDIX B—OPINION OF THE DISTRICT COURT REGARDING AWARD OF ATTORNEY'S FEES

UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW JERSEY

Civil Action No. 83-1569

Hon. Frederick B. Lacey
United States District Judge

DIANE L. MAURIELLO,

Plaintiff,

-vs-

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, et al.,

Defendants.

O P I N I O N

This matter comes before the court on the motion of plaintiff for an order fixing an award of attorneys' fees in the amount of $96,361.50.* The parties have agreed on an appropriate award of costs in the amount of $371.56, in addition to that taxed against

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* Plaintiff originally sought a lodestar figure of $116,580.75 enhanced by an upward multiplier of 1.5, yielding a total fee of $174,871.13 plus $1154.36 in costs. For the reasons set forth on the record in November 26, 1984, the court declined to grant either the upward multiplier sought by plaintiff or the downward multiplier defendants requested. On that date the court ruled that

(Cont'd)

defendants in the taxations filed November 15, 1984 and December 26, 1984. The court has considered all of the submissions of counsel, as well as the arguments made on November 26, 1985, and has carefully analyzed plaintiff's affidavits in support of the fee application. For the reasons set forth herein, the court concludes that a reasonable attorneys' fee award shall be granted in the amount of $60,717.50, to which shall be added an award of costs as noted above, for a total award of $61,089.06.

The Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988, provides for a discretionary award of reasonable attorneys' fees to the prevailing party in a civil rights action. A party need not prevail on all claims at issue, but only "on an important matter in the course of litigation" to secure an attorney fee award. *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 689 F. 2d 1161, 1166, 1171 (3d Cir. 1982), *cert. denied*, ____ U.S. ____ (1983); *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983). On the other hand, a fee petitioner should not be treated as a prevailing party to the extent he has been unsuccessful in asserting certain claims. *Hughes v. Repko*, 578 F. 2d 483, 487 (3d Cir. 1978). Where work performed on an unsuccessful claim can be segregated from work done on successful theories of recovery

> [t]he congressional intent to limit awards to prevailing parties requires that these unrelated

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(Cont'd)

the paralegal time would be compensated at $15.00 and the associate time at $50.00 and set forth its reasons in the record. On January 15, 1985 plaintiff submitted a new proposed lodestar figure of $96,361.50. This figure is based on a recalculation according to the November 26 rulings, as well as certain reductions proposed by plaintiff, and additional time expended by counsel subsequent to the submission of the first Ellenport affidavit on this issue.

> claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

Hensley, at 435.

On July 31, 1984 a jury returned a verdict in favor of plaintiff on her substantive and procedural due Process claims and awarded her $50,015.00 in damages.* The court issued injunctive relief in conjunction with the verdict. For purposes of the Act, plaintiff is a prevailing party. *Hensley,* supra. Ordinarily, the court must evaluate the "interrelatedness among the successful and unsuccessful claims when determining the reasonableness of an award". *Inmates of Allegheney, County Jail v. Pierce*, 716 F.2d 177, 181 (3d Cir. 1983). However, in this case plaintiff has conceded that certain amounts of time spent pursuing unsuccessful claims and issues are clearly segregable from the balance of time claimed, and the court has been guided by plaintiff's evaluation on this issue.** Therefore, the court has deducted eight hours from the time spent preparing the complaint as representing the amount of time expended on state law issues on which plaintiff did not prevail.*** Similarly, time spent on the unsuccessful motions *in limine,* the conflict of interest issue, the question of Di Mayorca's threats; and the unsuccessful immunity issue has been striken from the claim. The balance of the reductions in time are not concerned with the relationship of successful to unsuccessful claims, but

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* This was later reduced.

** *See,* plaintiff's letter memorandum of January 15, 1985.

*** The court has not deducted time spent on the state law claims from the time devoted to preparing the response to the first summary judgment motion for reasons set forth *infra.*

rather deal with the reasonableness of the amount of time expended, division of labor, and duplication of effort.

In enacting the Civil Rights Attorneys Fees Awards Act it was the general policy of Congress to encourage plaintiffs to act as private attorneys general in enforcing the Civil Rights Act. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975); *Newman v. Piggie Park Enterprises*, 309 U.S. 400 (1968). The Act was not intended to provide counsel with an unchecked source of compensation, thus "windfalls" are to be avoided. *Blum v. Stenson*, ____ U.S. ____, 104 S.Ct. 1541, 1546 (1984). However, ". . . much of the concern over a possible windfall to the attorney for the prevailing party may be met in determining the reasonableness of the fee." *Inmates of Allegheney County Jail*, at 180.

The party seeking an award of attorneys' fees under the Act must provide the court with evidence substantiating its claim for the number of hours worked and the rates claimed. *Hensley*, at 433; *See also, Webb v. Dyer County Board of Education*, Docket No. 83-1360, slip op. at 7 (U.S., April 17, 1985). In evaluating the application for fees ". . . the district judge is empowered to exercise his informed discretion "as to the reasonableness of the claim, *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166 (3d Cir. 1973 [*Lindy I*], and should exclude from the initial calculation all hours not "reasonably expended". *Hensley*, at 434. The court may find that the reasonable rate of compensation varies for different activities, *Lindy I* at 167, and may reduce the time charges for certain work to the associate or paralegal compensation level if the "level of experience required for certain tasks" justifies the reduction. *In Re Fine Paper Antitrust Litigation*, 751 F.2d 562, 591 (3d Cir. 1984).

Appendix B

The Supreme Court has recently noted that the

> . . . most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.

Hensley, at 422. This calculation represents the "lodestar" figure, *Lindy I* at 168, *Lindy Bros. v. Am. Radiator*, 540 F.2d 102, 117 (3d Cir. 1976) [*Lindy II*], which may then be adjusted either upward or downward, at the discretion of the court, based on the quality of the work, the over all reasonableness of the fee claim, and whether "special circumstances" exist to reduce or eliminate the claim. *Hensley, supra; Hughes, supra.* The analysis requires a twin inquiry into (a) the reasonableness of the number of hours spent on the case, and (b) the reasonableness of the hourly rate claimed. *Ursic v. Bethlehem Mines*, 719 F.2d 670, 676 (3d Cir. 1983). The "novelty" or "complexity" should be considered and reflected in the number of hours allowed, whereas the particular skills of counsel will be reflected in the hourly rate permitted. *Blum v. Stenson*, ____ U.S. ____, 104 S.Ct. 1541, 1548-1549 (1984).

For the reasons set forth in the record on November 26, 1983, the court has already determined that there are no special circumstances in this case to justify either an upward or downward modification of the lodestar figure. The court has already reduced the reasonable hourly rate to be permitted for associate level and paralegal level work to, respectively, fifty dollars and fifteen dollars per hour. The court has determined that the hourly rate claimed for partner-level work during the litigation is reasonable but has, for reasons set forth in more detail below, reduced the number of hours compensated at this rate to reflect the court's evaluation

of what level of expertise was required for certain work performed by a partner. Similarly, certain work claimed by an associate has been accorded compensation at the paralegal rate. Additionally, the court has stricken as non-compensable certain claimed hours, has disallowed some time as representing duplicative effort, and has reduced as unreasonably excessive the amount of time claimed for particular projects. In reaching these conclusions the court has been mindful of the principles outlined above and of the recent admonition from the Court of Appeals for the Third Circuit that

> Our cases supply no authority for the rewarding of non-stop meter running in law offices . . . . Nor do we approve the wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals or less experienced associates. Routine tasks, if performed by senior partners in large firms, should not be billed at their usual rates. A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn.

Ursic v. Bethlehem Mines, et al., 719 F.2d 670, 677 (3d Cir. 1983) (citations omitted).

I. HOURS CLAIMED BUT DISALLOWED

As noted in Mr. Ellenport's January 15, 1985 letter to the court, counsel expended 37.9 hours on the unsuccessful motions *in limine*. This time was accrued as follows:

Simonelli	28.4
Ellenport	4.5
Lehn	5.0
	37.9

Appendix B

Plaintiff concedes this time should be deducted from the lodestar figure. *See,* Ellenport letter of 1-15-85, p.2, ¶¶6 and 7. Ms. Simonelli dedicated 2.3 hours researching issues which were not brought before the Court on the conflict of interest of defense counsel and the DiMayorca threats. Plaintiff agrees these, too, should be stricken. *Id.* at ¶10. Plaintiff proposes a reduction of 4 more hours from Mr. Ellenport's claimed time for his work on the immunity issues on which plaintiff did not prevail. *Id.* at ¶8. Upon review of the affidavit of Mr. Ellenport in support of the fee application (hereinafter, the affidavit) the court finds there are two entries which contain an unsegregated claim for time spent on the immunity issue, among others. The court will disallow half of the hours Mr. Ellenport claimed for the unsegregated entries on July 28 and 29, 1984 which include time spent on this unsuccessful issue. Plaintiff has failed to establish, by proof, that any lesser amount of time applies. Nine hours will be deducted from Mr. Ellenport's time.

There is an entry dated November 22, 1983 for the preparation of a letter response to defendants' reply brief on a summary judgment motion. The entry reflects an expenditure of 3 hours by Mr. Holsinger and 4 hours by Ms. Simonelli. There is no provision in the Local Rules of this District for such a surreply and this court refuses to encourage the submission of extraneous unsolicited material by awarding fees to counsel for this effort. These seven hours will be stricken.

For each entry containing an unsegregated claim for activities including the filing and service of papers the Court will disallow 1.5 hours or the entire amount of time claimed, whichever is less. The affidavit is silent as to the manner of service and the court has presumed mail service upon adversary counsel and hand delivery to the Court. Service by mail is a secretarial function

which is covered by the ordinary office operating overhead. It is not compensable as an attorney fee. Hand delivery upon the Court is equally non-compensable, it requires absolutely no exercise of professional judgment, and is more properly included in office overhead. Had counsel used a messenger service or some less exorbitant manner of service (other than hand-delivery by an attorney) the court might be otherwise inclined and consider the disbursement a compensable expense. In this case the entries merely serve to inflate the lodestar figure. Based on travel time claimed for other activities, the court has concluded it takes one hour for the round trip between counsel's Roseland office and the Newark Courthouse. An additional half hour has been allowed for parking, walking the lenghthy courthouse corridors, waiting for conformed copies of the filings, and returning. The time to be deducted for this aspect is as follows:

5/2/83	.5
5/4/83	1.5
7/7/83	.2
8/2/83	.1
9/14/83	.7
10/31/83	1.5
12/16/83	.3
7/20/84	1.5
8/6/84	1.5
8/9/84	1.5
8/30/84	1.5
	10.8

All of this time was expended by Ms. Simonelli, with the exception of the last entry attributed to Mr. Ellenport.

Plaintiff has made no attempt to convince the Court that Ms. Simonelli's presence at any hearing, conference, deposition or at trial, at which more senior counsel was present, was necessary

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to the prosecution of this action. Despite counsel's affirmation that all duplicative time has been excised from the fee petition, Affidavit of Ellenport of August 30, 1984, ¶18, the court's review of the affidavit reveals many instances where time is claimed by Ms. Simonelli on the same day and for similar work claimed by other counsel. The court finds these efforts are duplicative and they are disallowed as follows:

2/9/83	1.7
2/16/83	.25
2/22/83	1.1
2/28/83	1.4
5/25/83	.4
6/2/83	.2
6/7/83	.3
7/8/83	.35
11/4/83	.75
1/24/84	.2
3/14/84	.2
4/24/84	.3
4/30/84	4.0
7/5/84	.2
7/25/84	8.5
7/26/84	8.0
7/27/84	7.0
7/30/84	8.5
7/31/84	8.0
8/13/84	.5
8/15/84	.2
8/16/84	1.4
8/17/84	.5
	total—53.95

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Further entries reveal claims for time where it appears two attorneys have done the same work, or counsel has prepared for an argument or deposition at which another attorney actually appeared, or where the entry is vague as to how the work identified differs from the same work performed by other counsel (this is particularly true with respect to entries dealing with trial preparation done by Ms. Simonelli). These claims will be disallowed as duplicative and vague as follows:

2/24/83	.1	RSE
2/26/83	.3	MPS
5/30 & 6/1/83	.3	RSE
6/3/83	1.0	RSE
7/21/83	2.0	MPS
8/2/83	3.1	MPS
11/21/83	.4	MPS
11/22/83	1.0	MPS
2/8/84	1.3	RSE
4/3/84	1.0	MPS
5/29/84	.5	RSE
7/23/84	9.5	MPS
7/25/84	7.0	MPS
7/26/84	7.0	MPS
7/27/84	10.0	MPS
7/28/84	12.0	MPS
7/29/84	12.0	MPS
7/30/84	3.5	MPS
TOTAL :	68.8	MPS
	3.2	RSE

II. CLAIMED TIME REDUCED AS EXCESSIVE

Of the time remaining the Court finds, upon its independent

evaluation of Mr. Ellenport's Affidavit in support of the fee petition, that the following amounts of time claimed must be reduced as they are in excess of what the court deems could have been reasonably expended on the particular effort.

(a) *The Complaint*

It appears that counsel spent approximately 41.1 hours on the initial research, drafting, revising and redrafting of the original complaint in this action. (This calculation excludes 9.5 hours dedicated to client and inter-counsel conferences, interviews and drafting of chronologies.) Of that time 35.2 hours are credited to Ms. Simonelli, 3.3 hours were expended by Mr. Holsinger, and Mr. Ellenport dedicated 2.6 hours to this aspect of the case. Plaintiff has proposed an eight hour deduction from the time claimed by Ms. Simonelli as representing the time she spent preparing the state law claims which were ultimately dismissed. The state law claims comprised two pages of a thirty page complaint. The court finds this is an accurate appraisal of the probable amount of time spent on these unsuccessful claims and the time will be deducted. The balance of time claimed, 27.2 hours for Ms. Simonelli and 5.9 hours expended by the partners, will be allowed as claimed. The court finds this to have been a reasonable expenditure of hours given the relative complexity of the facts of the case and the need to do preliminary research on possible theories of recovery. Time accrued on this type of pre-litigation activity is clearly compensable. *Webb*, slip op. at 8.

(b) *First Round of Discovery Requests*

The Ellenport affidavit reveals that 10.8 hours were consumed in drafting, revising and finalizing the first round of interrogatories, requests for production of documents and notices

to take deposition. 9.1 hours are attributed to Ms. Simonelli, 1 hour to Mr. Holsinger and .7 hours to Mr. Ellenport. I find this to have been a reasonable expenditure of effort and these hours will be allowed.

(c) *First Summary Judgment Response*

Counsel expended 112.9 hours preparing plaintiff's response to the first motion of defendants for summary judgment. (This figure excludes time identified as having been spent on preparing plaintiff's cross-motion to amend the complaint.) Of this time 104.25 hours are attributed to Ms. Simonelli for research, drafting and revising the brief. Assuming a forty hour work week, Ms. Simonelli would have dedicated more than two and a half weeks to this project alone. While the court concedes there were certain novel aspects to this case, in the court's reasoned judgment there were none so complex as to justify this expenditure of time. Ms. Simonelli's claim will be reduced by one fourth and a total of 78.2 hours will be allowed. Of this time two hours were dedicated to digesting a deposition transcript, a task which calls for the expertise of a paralegal—at the most. These two hours will be compensated at the paralegal rate. The .55* hours claimed by Mr. Ellenport, the 8 hours Mr. Holsinger dedicated to brief preparation and the 8.1 hours he claims for preparation for argument and for argument were reasonable amounts of time for these activities. this time will be allowed as claimed.

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* The entry for 10/31/83 reflects time spent on both the summary judgment response and the motion to amend. This time has been divided equally between the two efforts in the court's calculations. 1.5 hours have already been deducted for the unsegregated claim for filing a service. See deductions discussed, *supra* at 7-8.

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(d) *The Second Amended Complaint*

Counsel claim 27.1 hours for the preparation of the second amended complaint and the motion for leave to amend. Given the great amount of time spent researching and preparing the original complaint, and the fact that plaintiff had once amended the complaint as a matter of right (for which attorneys' fees have not been sought), the court finds that counsel spent an unreasonable amount of time on this effort. Additionally, given the liberal standard by which leave to amend is granted counsel spent an undue amount of time researching and preparing the motion to amend. The court will allow 20 hours for this effort. Fifteen hours will be compensated at the associate-level rate, and five hours at the partner-level.

(e) *The Response to the Second Motion for Summary Judgment*

The Affidavit reveals that 109.5 hours were expended on the plaintiff's response to the second motion of defendants for summary judgment. In the court's view there were no new or particularly complex issues presented in the second motion which had not been raised on the first motion. Granted, the facts of the case had been fleshed-out, and the prior brief would require redrafting for that, and to update the law on the issues, but there was nothing in the second motion so significantly different from the first to justify such an expenditure of time. Counsel have claimed 48 hours of partner effort, 36 hours of an associate's time, and 25.5 hours for the paralegal. Of the time attributed to Mr. Ellenport it is patent from the affidavit that 43.2 of those hours were dedicated to preliminary research and drafting, work that requires—at most—the skills and experience of an associate. As this is associate-level work it will be compensated as such.

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As the court finds counsel devoted an excessive amount of time to this project the amount of time claimed for paralegal and associate-level work will be reduced by one-third. Therefore, the court will allow 17 hours for paralegal work and 51.8 hours at the associate level as representing a reasonable amount of time to be expended on this task. The remaining 4.8 hours attributed to Mr. Ellenport, as well as the 1 hour claimed for his review of the moving papers, and the 3.8 hours claimed for preparation for argument, will be allowed to stand as reasonable expenditures of time. Those hours will be compensated as partner-level work.

(f) *Closing Argument*

The court minutes reflect that 2.5 hours were spent on the closing arguments at trial. Approximately half of this time was utilized by each side. Therefore, Mr. Ellenport summed-up for approximately 1.25 hours, yet his affidavit, discloses at least 8.5 hours of preparation for argument. (The court has included only those segregated claims for time devoted to this effort.) While the court recognizes that the trial lasted for approximately 28.25 hours, over the course of five court days, and that counsel needed to review the trial notes to prepare for argument, nevertheless this amount of time appears excessive. Given the large amounts of time counsel has claimed for review of trial proceedings during the trial—claims the court has allowed to stand unscathed—the court finds that four hours would have been a reasonable amount of time to expend preparing for closing argument.

(g) *Trial Submissions*

Preparation of jury instructions, trial memoranda and proposed findings of fact consumed 40.6 hours of counsel's time; 8.6 hours by Mr. Ellenport, 2.0 hours by Mr. Lehn and 30 hours

of Mr. Simonelli's time. While these submissions are required by the pre-trial order, none of them required any significant amount of new work. This is so because the law of the case had been fully briefed in two rounds of summary judgment motions, and the facts of the case had been previously set forth in detail in the pre-trial order. The preparation of jury instructions in a § 1983 action is merely a matter of locating the appropriate proposed instruction in any number of good form books. There were few instructions in this action which should have required novel research and drafting by counsel. The balance of the submissions merely called for revising the content of the Pre-Trial Order or the summary judgment brief into a new format.

As the court finds an excessive amount of time is claimed for what is essentially repetitive work, the time claimed by the associate shall be reduced by one-third. Therefore the court will allow fees for 20 hours of associate-level work and 10.6 hours of time for Messr. Ellenport and Lehn.

(h) *Digesting Depositions*

Mr. Posnock, the law clerk (or paralegal), devoted 22 hours to outlining and digesting deposition transcripts in preparation for trial. These claims are not identified as to what deposition has been outlined in each case. Because several transcripts had been reviewed, digested, and/or outlined by other counsel in the case [*see* entries dated 9/22, 10/13, 14 & 17/ 1983, 3/1, 4/3 & 10 and May 41, 1984] five hours of this time shall be disallowed to adjust the lodestar for possible duplication of effort in this respect. Mr. Posnock's time will be allowed in the amount of 18 hours for the digesting of deposition transcripts.

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(i) *Eleventh Amendment Brief*

Counsel claims a total of 97.3 hours dedicated to the preparation of the plaintiff's brief on the Eleventh Amendment issue.* Of that time Mr. Ellenport claims 24.9 hours, Mr. Lehn claims 16.5 hours, Ms. Simonelli notes 39 hours and Mr. Posnock contributed 16.9 hours to the effort. This time was dedicated to research, drafting and revising the brief. With this many people-working on the same issue it stands to reason there was at least some duplication of effort. Furthermore, the court finds this was an excessive amount of time to have been spent on this limited issue. Additionally, the court notes that an inordinate amount of partner-time was dedicated to tasks which only call for the skill and experience of an associate. For these reasons the court will disallow one third of the time claimed by each person as duplicative and/or excessive, and will compensate half of the time remaining for Messrs. Ellenport and Lehn at the associate-level rate. Therefore, 11.3 hours will be allowed for Mr. Posnock, 39.8 hours will be compensated for associate-level work, Mr. Lehn will be allowed 5.5 hours at his regular rate, and Mr. Ellenport will be compensated at his ordinary rate for 8.3 hours.

(j) *The Damages Issue*

Counsel dedicated 28.9 hours to researching and writing on the damage/*Carey v. Piphus* question. Of this time 16 hours are attributed to Mr. Ellenport, 6 hours to Ms. Simonelli and 6.9 to Mr. Posnock. The bulk of the time claimed by Mr. Ellenport is identified for work that calls for the skills of an associate only.

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* The time claimed by Mr. Posnock on 8/3/84, and for Messrs. Ellenport and Lehn and Ms. Simonelli for 8/3/84 has been divided between this issue and the *Carey* question as the entries are not segregated.

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Additionally, the court finds an excessive amount of time was dedicated to this issue. The Court will allow 20 hours as reasonable; 6 hours for paralegal/clerk work; 10 hours for associate level work and 4 hours for the partner's review.

(k) *Post-Trial Motions*

Plaintiff's response to defendants' post-trial motions consumed 45.8 hours of attorney time credited to Mr. Ellenport (22.8), Mr. Lehn (3.0) and Ms. Simonelli (20.0). Upon review of the affidavit and the motions made, the court does not believe the issues called for such an expenditure of effort. The court notes that 30 hours would have been a reasonable amount of time to prepare these responses and that time will be compensated at the associate level for 20 hours and at the partner level for 10 (3.0 for Mr. Lehn, the balance at Mr. Ellenport's rate).

(l) *The Fee Application*

Counsel expended 73.7 hours, excluding argument time, on this fee application. [This includes time outlined in Mr. Ellenport's supplemental affidavit submitted to the Court on January 15, 1985.] Review of the Affidavits discloses that much of Mr. Ellenport's claimed time was spent tabulating billing records—a task which calls for the skills of a paralegal/clerk, at best—and preliminary research—which is primarily associate-level work. Additionally, the amount of time dedicated to this issue far exceeds that which may be deemed reasonable in light of the limited case law on this question. Billing records should have been regularly kept during the course of the litigation and any paralegal or clerk could have pulled together a chronological listing for a partner to edit. The court will allow, as reasonable, eight hours of paralegal time and two hours of partner time to prepare the fee affidavit. Given the limited case law on this issue counsel should have been

able to prepare a brief in fifteen hours; ten of associate-level work, and five of a partner's time. The reply should have consumed no more than that as the law had been briefed and counsel needed only to respond to defendants' analysis of the fees claimed. The court will allow as reasonable a total of forty hours on this issue, as described above; eight hours of paralegal time, 20 hours of associate time and twelve hours for partner-level work.

III. REDUCTION TO A LOWER RATE OF COMPENSATION

Some rate reductions have been noted above in the sections discussing excessive claims for time. The court finds that a number of other items should be compensated at a lower rate than that claimed. For example, certain entries disclose a partner doing that which is essentially associate-level, or sometimes even paralegal/clerk level work. Other entries reflect the associate spending time on paralegal efforts. Generally, unsegregated entries will be compensated at the lowest applicable rate. For such entries the court finds plaintiff has failed to carry its burden to produce proof that the higher rate applies.

The affidavits show fifteen hours claimed for travel time to and from the Newark Courthouse. At plaintiff's suggestion, *see* Ellenport letter of January 15, 1985, this time will be compensated at $50.00 per hour. As noted above, Ms. Simonelli's travel time has been disallowed as duplicative. The balance of the reduced-rate items are as follows:

2/22/83 MPS* 3.2 C*

* C = Clerk/paralegal time to be compensated at $15.00 per hour. A = Associate level time to be compensated at $50.00 per hour. MPS = Ms. Simonellis' time. RSE = Mr. Ellenport and JRH = Mr. Holsinger's time.

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2/28/83	MPS	.1	C
3/ 7/83	MPS	1.0	C
6/15/83	MPS	.4	C
6/21-24	JRH	1.3	A
7/25-26	JRH	1.7	C
7/25/83	JRH	.3	A
7/27/83	JRH	1.5	A
7/29/83	JRH	1.9	A
8/ 2/83	JRH	.2	C
9/13/83	MPS	2.5	C
10/11/83	JRH	.5	A
10/13/83	MPS	.5	C
10/14/83	MPS	1.0	C
12/29/83	MPS	.3	C
1/13 & 15	RSE	2.0	A
1/16/84	MPS	.2	C
2/ 6/84	MPS	.2	C
4/10/84	RSE	1.0	A
4/23/84	MPS	.1	C
4/25-28	RSE	10.1	A
5/ 7/84	MPS	4.5	C
5/ 8/84	RSE	1.3	C
6/13/84	MPS	1.0	C
6/13/84	RSE	1.5	A
7/13/84	RSE	.8	A
7/17/84	RSE	1.6	C
7/18/84	MPS	1.6	C
7/19/84	MPS	9.0	C
7/21/84	MPS	10.0	C
7/22/84	MPS	8.0	C
8/ 3/84	RSE	1.3	C
8/10/84	RSE	.5	A
8/11/84	MPS	.4	C

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8/14/84	RSE	.7	A
8/20/84	MPS	4.0	C
8/22/84	MPS	3.5	C

TOTAL : 51.2 hours
at clerk/paralegal rate
22.1 hours
at associate rate

The balance of the time claimed by counsel will be allowed and will be compensated according to the rates ordinarily charged by the attorney performing the work (as modified by the court on November 26, 1984) at the time accrued.

Therefore, the total lodestar fee is calculated at* $60,717.50,

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* (a) 27.2 x $50 = $1360.00
5.9 x 130 = 767.00
(b) 9.1 x 50 = 455.00
1.7 x 130 = 221.00
(c) 2.0 x 15 = 30.00
76.2 x 50 = 3910.00
16.65 x 130 = 2164.50
(d) 15 x 50 = 750.00
5 x 130 = 650.00
(e) 17 x 15 = 255.00
51.8 x 50 = 2590.00
9.6 x 130 = 1248.00
(f) 4.0 x 130 = 520.00
(g) 20 x 50 = 1000.00
8.6 x 130 = 1118.00
2.0 x 125 = 250.00
(h) 18 x 15 = 270.00
(i) 11.3 x 15 = 169.50
39.8 x 50 = 1990.00
8.3 x 130 = 1079.00

(Cont'd)

and the court declines to exercise its discretion in awarding an enhancement of the lodestar figure. To the lodestar figure will be added the agreed upon costs of $371.56, for a total award of $61,089.06 in reasonable attorneys' fees and costs under 42 U.S.C. § 1988.

DATED: MAY 22, 1985

s/ Frederick B. Lacey

Hon. Frederick B. Lacey
United States District Judge

(Cont'd)

5.5 x 125 =	687.50
(j) 6 x 15 =	90.00
10 x 50 =	500.00
4 x 130 =	520.00
(k) 20 x 50 =	1000.00
7 x 130 =	910.00
3 x 125 =	375.00
(l) 8 x 15 =	120.00
20 x 50 =	1000.00
12 x 180 =	1560.00
(a) through (l) subtotal =	$27,559.50
III. 51.2 x 15 =	168.00
22.1 x 50 =	1,105.00
balance allowed =	31,285.00
TOTAL	$60,717.50

APPENDIX C—OPINION OF THE COURT OF APPEALS REGARDING AWARD OF ATTORNEY'S FEES

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5400 & 85-5409

DIANE L. MAURIELLO

v.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO DI MAYORCA, M.D., Individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., Individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA L. JANSONS, Ph.D., Jointly and Severally

Diane L. Mauriello,

Appellant in No. 85-5400

The University of Medicine and Dentistry of New Jersey, The Graduate School of Biomedical Sciences, Giampiero di Mayorca, M.D., Individually and as Chairperson of the Department of Microbiology, Rodney Rothstein, Ph.D., Individually and as Chairperson of the Graduate Committee of the Department of Microbiology,

Appellants in No. 85-5409

Appendix C

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 83-1569)

Submitted Under Third Circuit Rule 12(6)
March 3, 1986

Before: GIBBONS, BECKER and ROSENN, *Circuit Judges*

(Opinion Filed: April 25, 25, 1986)

ELLENPORT & HOLSINGER, P.A.
65 Livingston Avenue
Roseland, New Jersey 07068

ROBERT S. ELLENPORT, ESQ.
Of Counsel

MARIA P. SIMONELLI, ESQ.
PERRY FEINBERG, ESQ.
On the Brief

Attorneys for Diane L. Mauriello

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Newark, New Jersey

ANDREA M. SILKOWITZ
Deputy Attorney General
Of Counsel

Appendix C

BARBARA A. HARNED
Deputy Attorney General
On the Brief

Attorneys for University of Medicine and Dentistry, di Mayorca, and Rothstein

OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

The plaintiff, Diane L. Mauriello appeals, and the defendants, the University of Medicine and Dentistry of New Jersey and certain of its faculty members, cross-appeal, from an order awarding counsel fees pursuant to 42 U.S.C. § 1988 (1982). In a related appeal, *Mauriello v. The University of Medicine and Dentistry of New Jersey*, Nos. 84-5666; 5720 (3d Cir. January 14, 1986), this court held that Mauriello failed to prove a prima facie case, and directed the entry of a judgment for the defendants. Thus Mauriello received no relief as a result of this lawsuit. In such circumstances she is not the prevailing party within the meaning of section 1988. *E.g. Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982).

The judgment awarding fees will, therefore, be reversed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

s/ John J. Gibbons
Circuit Judge

APPENDIX D—JUDGMENT OF THE DISTRICT COURT ENTERED ON THE DOCKET AUGUST 13, 1984

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

CIVIL ACTION FILE NO. 83-1569

DIANE L. MAURIELLO

vs.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF N.J., et al

JUDGMENT

This action came on for trial before the Court and a jury, Honorable FREDERICK B. LACEY, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that a judgment be and is hereby entered in favor of the plaintiff, Diane L. Mauriello, and against the defendants, The University of Medicine and Dentistry of N.J., the Graduate School of Biomedical Sciences, Giampiero di Mayorca and Rodney Rothstein, with damages in the sum of $50,015.00 assessed to defendant The University of Medicine and Dentistry of N.J., with costs and attorney's fees.

Dated this 8th day of August, 1984

s/ F. B. Lacey
UNITED STATES DISTRICT
JUDGE

APPENDIX E—ORDER OF THE DISTRICT COURT ENTERED ON THE DOCKET AUGUST 28, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HON. FREDERICK B. LACEY
CIVIL ACTION NO. 83-1569(L)

DIANE L. MAURIELLO,

Plaintiff,

v.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, et al.,

Defendants.

ORDER

THIS MATTER, having been opened to the Court on the motion of defendants, by Irwin I. Kimmelman, Attorney General of New Jersey, appearing on behalf of defendants (Barbara A. Harned, Esq. appearing) for an Order vacating the damage award returned by the jury on July 31, 1984 in this matter, entering judgment notwithstanding verdict, or, in the alternative, granting defendants a new trial as to all issues in the case including on the grounds that the verdict for plaintiff in the amount of $50,015.00 was excessive, against the weight of the evidence and given under the influence of passion or prejudice and granting a stay of execution of judgment and injunction pending appeal and for an Order dismissing the complaint against defendants

Appendix E

The University of Medicine and Dentistry of New Jersey and The Graduate School of Biomedical Sciences on the grounds of Eleventh Amendment immunity; and Ellenport & Holsinger, P.A., attorneys for plaintiff, Diane L. Mauriello, (Robert S. Ellenport, Esq. appearing) appearing in opposition thereto; and the Court having read and considered the moving papers and memoranda of law; and having considered all of the evidence and being fully informed; and having heard the argument of counsel; and for good cause shown,

It is on this 17 day of August 1984,

ORDERED, that defendants' motion for an Order vacating the damage award of $50,000.00 returned by the jury on July 31, 1984 in this matter be and is hereby denied; and it is further

ORDERED, that defendants' motion pursuant to Fed.R.Civ.P. 50 for an Order for judgment notwithstanding verdict as to the jury's verdict finding a violation of plaintiff's substantive due process rights be and is hereby denied; and it is further

ORDERED, that defendants' motion in the alternative pursuant to Fed.R.Civ.P. 59 for an Order granting defendants a new trial as to the jury's verdict finding a violation of plaintiff's substantive due process rights be and is hereby denied; and it is further

ORDERED, that the Court being of the opinion that the jury's damage award is excessive, defendants' motion in the alternative pursuant to Fed.R.Civ.P. 59 for an Order granting defendants a new trial as to all issues in the case be and is hereby granted only as to the issue of damages but that the verdict stand

good in all other respects; and that a new trial be and is hereby granted only on the issue of damages, unless plaintiff or her attorney consents to remit the sum of Forty Thousand ($40,000.00) Dollars on the judgment entered in this case within fourteen (14) days from the date of this Order; and if plaintiff or her attorney consents to remit the sum of Forty Thousand ($40,000.00) Dollars on the judgment entered in this case within fourteen (14) days from the date of this Order, defendants' motion for a new trial is in all respects denied; and in that event, the Clerk of the Court is directed to correct the judgment entered in this case so as to conform to the amount of the verdict as herein reduced; and it is further

ORDERED, that the motion of defendants University of Medicine and Dentistry of New Jersey and Graduate School of Biomedical Sciences to dismiss the complaint on the grounds of Eleventh Amendment immunity be and is hereby denied; and it is further

ORDERED, that defendants and their respective agents, servants, employees, attorneys and those persons in active concert or participation with them be and hereby are required and directed to specifically perform in good faith and fair dealing as follows:

> 1. An *ad hoc* committee shall be formed consisting of three (3) members selected as follows: Within fifteen (15) days of the date of this Order, plaintiff shall provide defendants and their attorney with written notice designating to serve on said committee one (1) faculty member who is in the Department of Microbiology of the Rutgers Medical School, Piscataway, New Jersey. Within fifteen (15) days after receipt of plaintiff's said

notice, defendants shall provide plaintiff and her attorney with written notice designating to serve on said committee one (1) faculty member who is in the Department of Microbiology of either defendant University of Medicine and Dentistry of New Jersey or the Rutgers Medical School, Piscataway, New Jersey. The two faculty members thus chosen shall within twenty (20) days of written selection of the second faculty member, and in good faith and fair dealing, meet and select the third member who shall have scientific expertise in the field of microbiology and shall be on the faculty of the Department of Microbiology or its equivalent of any accredited college or university other than and not associated with defendant University of Medicine and Dentistry of New Jersey. Upon the acceptance by the third member to serve on the *ad hoc* committee, the *ad hoc* committee shall provide written notice to the parties and their attorneys of the name of the third member so selected.

2. Within thirty (30) days of the date of this Order, defendants shall act in good faith and fair dealing to facilitate a meeting between plaintiff and Vilma K. Jansons, Ph.D. to discuss research that plaintiff believes Jansons may possess or control and which refers, evidences or relates in any way to plaintiff's thesis proposal.

3. Within thirty (30) days of the selection of the third member, unless plaintiff and the *ad hoc* committee agree otherwise, plaintiff shall present

her thesis research material to a meeting of the *ad hoc* committee. At least fourteen (14) days prior to said meeting, the *ad hoc* committee shall notify plaintiff in writing, with a copy to plaintiff's counsel, of the date on which the meeting will be held, of the manner in which plaintiff is to make her presentation and whether or not the *ad hoc* committee desires to review plaintiff's thesis research materials prior to said meeting. The *ad hoc* committee shall act promptly and in good faith and fair dealing in reviewing plaintiff's presentation of her thesis research material. No member of the *ad hoc* committee shall meet or discuss with any other person plaintiff's presentation or thesis research material, without plaintiff's prior written consent. The *ad hoc* committee shall meet with plaintiff at such site as shall be selected by at least two of the three faculty members. A verbatim record shall be made of plaintiff's presentation. Decisions of the *ad hoc* committee shall be by majority vote and its discussions and deliberations shall be closed to any other person. Subject to further order of the Court, plaintiff shall bear all costs and expenses, if any, of the member she selects, defendants shall bear all costs and expenses, if any, of the member they select and plaintiff and defendants shall equally bear the costs and expenses, if any, of the third member selected.

4. Within fifteen (15) days of plaintiff's presentation to it, the *ad hoc* committee shall, in writing, advise both plaintiff and defendants

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Giampiero di Mayorca and Graduate School of Biomedical Sciences of its recommendation either that: (a) plaintiff's thesis research material as presented is acceptable as sufficient for plaintiff to commence writing a final thesis and preparing for a public defense of the final thesis before an Examination Committee to be selected pursuant to the *Guidelines* of The Graduate School of Biomedical Sciences; or (b) plaintiff's thesis research material requires substantial additional work; or (c) plaintiff's thesis research is not of good scientific quality and Ph.D. caliber;

5. Defendant Giampiero di Mayorca, having advised the Court that he will accept any of the *ad hoc* committee's recommendations, shall, within seven (7) days of his receipt of said recommendation, forward said recommendation to defendant Graduate School of Biomedical Sciences, which shall within seven (7) days of its receipt of said recommendation from defendant Giampiero di Mayorca, present said recommendation to the Admissions Review Committee of defendant Graduate School of Biomedical Sciences which shall within seven (7) days of its receipt of said recommendation, act in good faith and fair dealing to implement the *ad hoc* committee's recommendation referred to in subparagraph 4 hereof and to reinstate plaintiff as a Ph.D. candidate in the Department of Microbiology upon receipt of the *ad hoc* committee's written recommendation, provided that within fourteen (14) days of the *ad hoc*

committee's written recommendation being submitted to plaintiff and defendant Giampiero di Mayorca, any faculty member of defendant University of Medicine and Dentistry of New Jersey, regardless of department, agrees to serve as plaintiff's thesis faculty advisor. If the recommendation of the *ad hoc* committee is that referred to in subparagraph 4(a) hereof, plaintiff shall commence writing her final thesis of the thesis proposal presented to the *ad hoc* committee. If the recommendation of the *ad hoc* committee is any other than that referred to in subparagraph 4(a) hereof, counsel for the parties shall in good faith promptly meet to mutually determine the form, content and structure of plaintiff's future course of study as a doctoral candidate in the University of Medicine and Dentistry of New Jersey. Should counsel fail to reach mutual agreement, either party may apply to the Court, upon fourteen (14) days' written notice to the other party, for a hearing and determination of matters in dispute. In all other respects, all Ph.D. candidate guidelines of defendant University of Medicine and Dentistry of New Jersey and Graduate School of Biomedical Sciences shall apply to plaintiff in the same manner in which they apply to other Ph.D. candidates.

6. Defendants University of Medicine and Dentistry of New Jersey, Graduate School of Biomedical Sciences and Giampiero di Mayorca shall, in good faith and fair dealing, assist plaintiff in finding a thesis faculty advisor; and

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7. Upon a faculty member agreeing to serve as plaintiff's thesis advisor, all Ph.D. candidate guidelines of defendant University of Medicine and Dentistry of New Jersey and Graduate School of Biomedical Sciences shall apply to plaintiff in the same manner in which they apply to other Ph.D. candidates.

and it is further

ORDERED, that defendants' motion pursuant to Fed.R.Civ.P. 62 (c) and (d) for an Order granting a stay of injunction pending appeal be and is hereby denied; and it is further

ORDERED, that this Court shall retain jurisdiction;

All of the above as set forth in the memorandum opinion of the Court placed in the record on August 10, 1984.

s/_____
FREDERICK B. LACEY,
U.S.D.J.

APPENDIX F—OPINION OF THE COURT OF APPEALS REGARDING RELATED MERITS APPEAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Diane L. MAURIELLO,
Appellant in 84-5720,

v.

the UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, the Graduate School of Biomedical Sciences, Giampiero di Mayorca, M.D., individually and as Chairperson of the Department of Microbiology, Rodney Rothstein, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, Vilma K. Jansons, Ph.D., jointly and severally,

Appellants in 84-5666.

Nos. 84-5666, 84-5720.

United States Court of Appeals,
Third Circuit.

Argued Nov. 6, 1985.

Decided Jan. 14, 1986.

Robert S. Ellenport (Argued), Marie P. Simonelli, Perry Feinberg, Ellenport & Holsinger, P.A., Roseland, N.J., for appellant Diane L. Mauriello.

Barbara A. Harned (Argued), Andrea M. Silkowitz, Deputy Attys. Gen., Irwin I. Kimmelman, Atty. Gen., N.J., Newark, N.J, for appellants—the University of Medicine and Dentistry of New Jersey, Giampiero di Mayorca, and Rodney Rothstein.

Appendix F

Before SEITZ, WEIS and ROSENN, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

This case presents the issue of due process requirements in the dismissal of a student from a state university's graduate program. After reviewing the record, we conclude that a series of informal academic evaluations by the faculty met constitutional standards and prevents judicial reexamination of the plaintiff's fitness to continue at the University. Accordingly, we will set aside a jury's damage award and a district court decree directing reinstatement pending reevaluation.

The plaintiff's complaint sought damages and injunctive relief under 42 U.S.C. § 1983 against the University of Medicine and Dentistry of New Jersey, as well as Professors Jansons, di Mayorca, and Rothstein. A jury allowed damages against the University, and by way of equitable relief the court directed a reevaluation of the plaintiff's academic work. Defendants have appealed the denial of their post-trial motions. Plaintiff has cross-appealed.

The University is a public institution of higher learning, and it is uncontested that the requisite state action exists.

Plaintiff was admitted to the doctoral program in microbiology at the University in 1975. She withdrew after a few weeks and was readmitted in September 1977. She completed her course requirements in 1979, and selected as her faculty advisor Dr. Vilma Jansons, who had access to a laboratory and was conducting research in an area of interest to plaintiff.

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The faculty advisor provides a student with the laboratory facilities, funding, and guidance needed to research a thesis. That professor is also responsible for evaluating a student's progress. After obtaining approval from the advisor, a student must submit a thesis and a dissertation abstract to an evaluation committee for review. If the work is acceptable, the committee will recommend that a doctorate be awarded.

In 1980, plaintiff submitted a thesis proprosal to Dr. Jansons and passed a qualifying examination. Plaintiff was required to submit a revision of her thesis proposal but did not do so for some twenty months. She finally obtained approval on July 9, 1982.

Part of the plaintiff's research efforts were incorporated into scientific papers that Dr. Jansons submitted for publication. These articles were rejected because of erroneous data, and this disapproval led Dr. Jansons to reevaluate the plaintiff's work. Deciding that she could no longer sponsor the plaintiff's research, Dr. Jansons, on September 3, 1982, wrtoe to Dr. di Mayorca, Chairman of the Department of Microbiology, stating that she was withdrawing as the plaintiff's faculty advisor as of December 31, 1982. The letter noted that there had been "less than satisfactory progress in [plaintiff's] research and several demonstrated instances of severe lack of understanding of the most pertinent data in the literature . . . Diane's commitment to research is not serious."

Plaintiff then met with Dr. di Mayorca and was told to "go back to the lab to correct the inaccuracies" in the research. On returning to the laboratory and discussing the matter further with Dr. Jansons, plaintiff resumed her research on a probationary basis. However, in November 1982, plaintiff accepted full-time

employment with an outside corporation, and limited her work in Dr. Jansons' laboratory to a part-time basis.

Soon thereafter, Dr. Jansons sent a note to plaintiff expressing dissatisfaction with her work. Setting an absolute deadline for certain assignments, Dr. Jansons wrote, "Where is the change that you said took place this autumn in you and according to you made you worthy of defending a Ph.D. thesis? It was, perhaps, different for some weeks after you were put on probation; now it's business as usual—total irresponsibility."

Because of the plaintiff's lack of progress and dedication, on December 15, Dr. Jansons submitted a report to Dr. Rothstein, Chairman of the Graduate Committee, stating that she would not sponsor the plaintiff's research after January 1, 1983. The memo continued, "[Plaintiff had] assured me that her performance would improve and, if not, she would withdraw from the graduate school. There has not been any improvement."

Plaintiff had met with Dr. Rothstein on December 14th and had explained her difficulties with Dr. Jansons. Plaintiff agreed to meet on January 6, 1983 with the graduate committee, an entity that serves as an advisory body to the department chairman on matters pertinent to Ph.D. candidates. In the meantime, plaintiff took no steps to secure another faculty advisor.

There was a dispute at trial over the instructions plaintiff was given as to the material she was to present at the January meeting. In any event, plaintiff arrived with only some of the data she used in the faulty experiments performed for Dr. Jansons. The committee, however, wanted to see the thesis material as well as some other extraneous research notes and scheduled another meeting for February 2nd. Before that occurred, the committee

met with Dr. Jansons to discuss her appraisal of the plaintiff's work. At the conclusion of that conference, some consideration was given to dismissing plaintiff from the doctoral program.

At the meeting on February 2nd, plaintiff again appeared without the thesis data. She testified she did not bring that material because Dr. di Mayorca had told her to bring the extraneous research notes instead. Because plaintiff again did not have the desired material, the committee scheduled a third meeting. Two days later, plaintiff told Dr. di Mayorca she would be unable to present the extraneous research because Dr. Jansons possessed much of it. Dr. di Mayorca was surprised that plaintiff did not have the documents because graduate students normally possess several copies of data from experiments they conduct.

Dr. di Mayorca advised the committee members that plaintiff was unable to produce the requested material, and therefore a majority adopted the previously tentative decision to dismiss. Accordingly, on February 14, 1983, Dr. Rothstein notified plaintiff that she was no longer a candidate for a Ph.D. degree.[1]

At trial the district court ruled as a matter of law that the plaintiff's termination was an academic dismissal, not a disciplinary one. All claims against Dr. Jansons were dismissed, as were the counts for punitive and compensatory damages against Professors di Mayorca and Rothstein. The compensatory damage

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1. The notice also stated that since plaintiff had fulfilled the requirements of an M.S. degree in microbiology, the committee recommended that she be awarded that degree. Several weeks later, however, plaintiff was informed that she was ineligible for the Master's degree because she had not submitted a thesis for approval. It appears that she is still eligible for that degree if she prepares an acceptable thesis.

claim against the University was submitted to the jury. All defendants, except Dr. Jansons, remained in the case for injunctive purposes.

In response to special interrogatories, the jury found that the University did not provide the requisite procedural due process, that the plaintiff's academic performance was not reviewed before dismissal, and that the defendant's action was arbitrary and capricious. The jury awarded $50,015 in compensatory damages.

Finding the verdict excessive, the district court directed a remittitur of $40,000, which the plaintiff accepted. As an equitable remedy, the district court ordered the parties to select an ad hoc committee of three persons, one member selected by plaintiff, one by the defendants, and the third by the two selected members. This committee was to review the plaintiff's thesis research material. Plaintiff was reinstated into the doctoral program and was permitted to make a presentation to the ad hoc committee.[2] The court also denied the defendants' post-trial motions for a new trial and judgment n.o.v.

On appeal, defendants contend that plaintiff did not have a property interest in continuing in the program, but even assuming the existence of such an interest, due process requirements were satisfied, and the dismissal was not arbitrary or capricious. Other issues raised in both the direct and cross-appeals need not be discussed in view of our disposition.

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2. After reviewing the dissertation material, the ad hoc committee met with plaintiff on October 9, 1985 and reported its unanimous decision that the plaintiff's research was "not so good scientific quality and Ph.D. caliber."

Appendix F

I.

Preliminarily, we address a jurisdictional matter. The district court's order denying the defendants' motions for judgment n.o.v. and new trial was docketed on August 28, 1984. The order stated that a new trial would be granted "unless plaintiff . . . consents to remit the sum of $40,000 . . . within 14 days." Plaintiff did so, and the acceptance was docketed on August 31, 1984. The notice of appeal was filed on September 28, 1984.

The question is whether the judgment became final when the remittitur order was entered or when the plaintiff's acceptance was filed. We conclude that the latter date is determinative for computing the time for appeal.

In *United States v. Schaefer Brewing Co.*, 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958), the Court said that "[i]t is necessary to determine whether the language of the opinion embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case. If it does so, it constitutes his final judgment." *Id.* at 232, 78 S.Ct. at 678. To be final, a "judgment for money must, at least determine, or specify the means for determining the amount." *Id.* at 233, 78 S.Ct. at 678.

An issue similar to the one here was decided in *Howell v. Marmpegaso Compania Naviera, S.A.*, 566 F.2d 992, 993 (5th Cir. 1978). The court held that until the plaintiff consented to the "remittitur, the judgment remained open, unfinished and inconclusive . . . . [A]cceptance of the remittitur rendered the judgment final and appealable, and actuated the 30-day time limit within which a notice of appeal must be filed." *See Also Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966); 15 C. Wright & A. Miller & Cooper, *Federal Practice and Procedure* §3915, at 603-04 (1976).

In the case at hand, until plaintiff accepted the remittitur, the University did not know the extent of its liability. The amount of the judgment was not fixed until plaintiff filed her consent, and at that point the time for appeal began to run. The notice of appeal was filed within 30 days of the plaintiff's acceptance, and therefore was timely.

II.

We turn now to the merits of the case. The Supreme Court had occasion to discuss the due process rights of students in state operated universities in *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) and *Regents of the University of Michigan v. Ewing,* ____ U.S. ____, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). *Horowitz* focused on procedural due process, while in *Ewing* the student's claim was based on substantive due process. In both cases the Court specifically assumed without deciding the existence of liberty or property interest but found no basis for holding the universities liable.

The Court has made a clear distrinction between disciplinary and academic dismissals. In the latter circumstances, courts are ill-equipped to review the largely subjective academic appraisals of the faculty. "[T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Horowitz,* 435 U.S. at 90, 98 S.Ct. at 955. A formal hearing is not necessary; rather an "informal-give-and take" between the student and the administrative body dismissing her is adequate. "[A] hearing may be useless or harmful in finding out the truth as to scholarship." *Id.* Thus, in the procedural due process context, informal review

and evaluation sessions between student and faculty meet constitutional requirements.

In the *Ewing* substantive due process context, the Court assumed "the existence of a constitutionally protective right in [the student's] continued enrollment" but found, after reviewing the record, that the right had not been violated. The student's dismissal "rested on an academic judgment that is not beyond the pale of reasoned academic decisionmaking when viewed against the background of his entire career at the University."

The Court observed that when judges are asked to "review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." The Court further noted that the judges have a special responsibility to safeguard the academic freedom of state and local educational institutions. ____ U.S. at ____, 106 S.Ct. at 513. *See also Stevens v. Hunt*, 646 F.2d 1168 (6th Cir. 1981); *Ikpeazu v. The University of Nebraska*, 775 F.2d 250 (8th Cir.1985); *Hines v. Rinker*, 667 F.2d 699 (8th Cir.1981); *Miller v. Hamline University of Law*, 601 F.2d 970 (8th Cir.1979).

In his concurrence in *Ewing*, Justice Powell wrote that the student's "claim to a property right is dubious at best," and noted that in contrast to the procedural due process cases where the protected interests originate under state law, substantive due process rights are created by the federal constitution. He found that the student's claim bore "little resemblance to the fundamental interests that previously had been viewed as implicitly protected by the Constitution." ____ U.S. at ____, 106 S.Ct. at 516.

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We have no difficulty in deciding that the plaintiff's dismissal here was based on academic not disciplinary grounds. As the district judge stated, "it was not a case of her being compelled by rule, order, or law of the school to do something and not having done it getting discharged . . . . This is not a case of somebody being disruptive in her misconduct, it is not a *Goss v. Lopez*, [419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)] situation." The focus of the University's inquiry was on the quality of the plaintiff's research and her dedication to academic pursuits, not misconduct.

In denying the defendants' motion for a directed verdict, the district judge said he believed that *Horowitz* required some kind of a hearing for plaintiff by the University. His views of the applicable law are reflected in his charge to the jury: "plaintiff had a right to notice of what the proceedings before the graduate committee would involve, and that she be aware, or be made aware, of whatever action was being considered with respect to her, and that she be given an opportunity to present her side of the case before being dismissed from the Ph.D. program."

On the issue of substantive due process, the jurors were told to determine whether the defendants' actions were arbitrary or capricious—whether there was a rational basis for the dismissal based on the quality of the plaintiff's work, or whether the defendants' decison was motivated by bad faith or ill-will, without any relationship to her academic performance.

We conclude that the submission of these matters to the jury was error because the plaintiff's proof was insufficient to survive the defendants' motion for a directed verdict. In reviewing the denial of a judgment n.o.v., we must consider the facts in the light most favorable to plaintiff. *Kademenos v. Equitable Life*

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Assurance Soc., 513 F.2d 1073 (3d Cir.1975); *Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96 (3d Cir.1977); *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095 (3d Cir.1980). However, if after review of the facts, it appears that under the applicable law the plaintiff has failed to present sufficient evidence to establish a claim, then judgment must be entered for the defendant. *See Molthan v. Temple University*, 778 F.2d 955 (3d Cir.1985); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir.1981); *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir.1969).

In essence, plaintiff asserts that the graduate committee arbitrarily dismissed her because she did not produce the requested records. The testimony at trial shows that this was only one of the factors considered. It is not disputed that plaintiff made serious errors in research and that as early as September 1983 Dr. Jansons communicated her dissatisfaction to Dr. di Mayorca. After being granted a probationary period, plaintiff accepted full-time outside employment while failing to show improvement in her academic work. Characterizing the plaintiff's attitude as irresponsible, Dr. Jansons wrote once more to the graduate committee that she would no longer sponsor the plaintiff's research or serve as faculty advisor.

Plaintiff then chose to discuss the matter with the graduate committee. As the trial judge phrased it, the "ball was in her court" but she made no effort to secure another faculty advisor, explaining that she expected help from the committee.

In three scheduled meetings with the graduate committee, plaintiff failed to produce materials that the average doctoral candidate would have expected to be of prime interest to the faculty. Plaintiff explained that on the first two occasions she was misled by the instructions given her. The third meeting never

occurred because allegedly she could not obtain some of the extraneous research data. A doctoral candidate's failure to keep and maintain research notes is an additional fact that the faculty may consider in evaluating a student's academic performance.

Plaintiff cannot deny that she was aware of the criticism of her research abilities or that she was twice informed her faculty advisor was going to withdraw. Unquestionably, plaintiff was on notice no later than September 1982 that her continuance as a Ph.D. candidate was in jeopardy.

In an educational setting, a student bears a heavy burden in persuading the courts to set aside a faculty's judgment of academic performance. This record leaves no doubt that the academic record of plaintiff was a determinative, if not the sole, reason for her dismissal.

The district court's concern that the University did not provide notice and opportunity for plaintiff to present an explanation of her position was misguided in two respects. The court focused on the last of the three scheduled meetings with the committee but failed to consider events begining in September 1982. In addition, the court unduly equated procedural due process in this case to the more traditional trial type proceeding. However, as stated in *Horowitz* and *Ewing*, when a student is discharged for academic reasons, an informal faculty evaluation with the student is all that is required.

Here, plaintiff was informed of her academic deficiencies, was given an opportunity to rectify them during a probationary period before being dismissed, and was allowed to present her grievance to the graduate committee. That she was eventually

dismissed does not negate the existence of those favorable forms of due process.

It follows that there were no factual issues to submit to the jury because, as a matter of law, the plaintiff had received all the procedural due process to which she was entitled.

A similar result obtains with respect to the substantive due process cliam. We share Justice Powell's doubt about the existence of such a substantive due process right in the circumstances here, but following the lead of the Supreme Court, we will assume *arguendo* that a constitutional right is implicated. Even so, we are required to show "great respect for the faculty's professional judgment." *Ewing*, ____ U.S. at ____, 106 S.Ct. at 513. The one faculty member who had the most extensive knowledge of the plaintiff's capabilities and attainments, or lack of them, was Dr. Jansons. Her evaluations are clear and forthright, and there is no basis for us or a jury to question her judgment.

In view of the professional evaluations contained in this record, we cannot say that the dismissal of plaintiff from the doctoral program was "beyond the pale of reasoned academic decisionmaking." *Id.* Likewise, we cannot say that the University impermissibly considered the plaintiff's choice to take outside full-time employment during her probationary period. Moreover, her failure to keep proper records demonstrated "a lack of judgment and inability to set priorities." *Ewing*, ____ U.S. ____ n. 13,106 S.Ct at 514 n.13.

Although there may have been personality conflicts between plaintiff and some of the faculty members, the evidence does not permit a finding that the plaintiff's dismissal was for reasons other than the quality of her academic performance.

Appendix F

Accordingly, the judgment of the district court will be vacated and judgment will be entered for defendants.

A True Copy:

TESTE:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX G—ORDER OF THE DISTRICT COURT ENTERED ON THE DOCKET FEBRUARY 5, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-1569(L)

Hon. Frederick B. Lacey

DIANE L. MAURIELLO

Plaintiff

v.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO DI MAYORCA, M.D., Individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., Individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., Jointly and Severally

Defendants

ORDER

This matter having been opened to the Court by Irwin I. Kimmelman, Attorney General of New Jersey, attorney for defendants, Barbara A. Harned, Deputy Attorney General appearing, in the presence of Perry Feinberg, Esq., attorney for plaintiff, and the Court having heard oral argument and reviewed the briefs and affidavits of both parties, and for good cause shown,

Appendix G

IT IS on this 31 day of January, 1986

ORDERED that implementation of paragraphs 5, 6 and 7 of this Court's injunctive Order entered on August 28, 1984 in this matter is hereby stayed pending issuance of the mandate of the United States Court of Appeals for the Third Circuit for its judgment entered on January 14, 1986 in appeal numbers 84-5666 and 84-5720 and pending disposition of any petition for rehearing filed by plaintiff in appeal numbers 84-5666 and 84-5720.

s/ Lacey
FREDERICK B. LACEY,
U.S.D.J.

NO. 86-112

Supreme Court, U.S.
FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIANE L. MAURIELLO,

Petitioner,

v.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO di MAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NO. 86-112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIANE L. MAURIELLO,

Petitioner,

vs.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO di MAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., Individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of the Case

Petitioner, Diane L. Mauriello, was accepted as a student in the doctoral program in microbiology at the respondent University in 1977 (Pa37).* A requirement for the awarding of the Ph.D. degree is the completion and defense of a research dissertation thesis by the student (Pa38). The research necessary for the thesis is conducted by the student in the laboratory of a faculty advisor selected by the student (Pa37 to Pa38). The advisor provides a student with laboratory facilities, funding and guidance and is responsible for evaluating a student's progress (Pa38).

Mauriello completed her course requirements in 1979 and selected Dr. Vilma Jansons as her faculty advisor (Pa37). As required by the Graduate School, Mauriello presented a thesis proposal to Dr. Jansons in 1980 (Pa38). The proposal, however, was not acceptable and revisions were required. Mauriello did not submit a revised proposal until twenty months later (Pa38).

While Dr. Jansons found serious weaknesses in Mauriello's work between 1979 and 1981, she allowed Mauriello to continue because her mother was very ill at the time. Moreover, because of Mauriello's poor background in biochemistry, Dr. Jansons found it difficult to decide if Mauriello would eventually overcome her weaknesses (Ja542 to 543, Ja548).** In 1982, some of Mauriello's

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* Pa refers to petitioner's appendix.

** Ja refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit in the related appeal and cross-appeal on the merits, Appeal Nos. 84-5666 and 84-5720. By order entered on September 25, 1985 the Third Circuit Court of Appeals permitted use of that joint appendix in the appeal and cross-appeal on the award of attorney's fees.

research was incorporated in scientific papers which had been submitted for publication (Pa38). The rejection of the articles led Dr. Jansons to reevaluate Mauriello's work (Pa38). Upon doing so, Jansons found several serious errors in the reported results of experiments conducted by Mauriello and significant errors in the manner in which she conducted research (Ja551-10, Ja193, Ja550-8, Ja552-10 to Ja557-4, Ja653-7 to 17, Ja756-3 to 13). The severity of these errors led Dr. Jansons to advise Mauriello that she would withdraw as her faculty advisor and could no longer sponsor her research (Pa38). Following discussion with Mauriello, Jansons agreed to give her another chance and Mauriello returned to the laboratory on a probationary basis (Pa38). In November, 1982, however Mauriello accepted full-time employment with an outside corporation and limited her work in the laboratory to, at best, a part-time basis (Pa38 to Pa39).

At the end of November, 1982 Jansons sent a note to Mauriello expressing dissatisfaction with her work (Pa39). Inquiring about the status of the corrections of the research errors Mauriello was supposed to have made, Dr. Jansons wrote "[w]here is the change that you said took place this autumn in you and according to you made you worthy of defending a Ph.D. thesis? It was, perhaps different for some weeks after you were put on probation, now it's business as usual—total irresponsibility" (Pa39). In this note, Jansons also advised Mauriello that the corrections were needed by a certain date in order to complete a presentation that was to be given on December 2, 1982 (Pa39). On November 26, 1982 Jansons and Mauriello met in Jansons' office at which time Mauriello did not have the corrections, told Jansons that she did not need the corrections and offered other excuses for not having com-

pleted the work. After listening to Mauriello, Jansons informed her that she would no longer sponsor her research (Ja569-8 to Ja571-5, Ja192).

In a memorandum dated December 15, 1982 Jansons informed Dr. Rothstein, Chairman of the Department's Graduate Committee, that she would not sponsor Mauriello's research after January 1, 1983 and further advised Dr. Rothstein that Mauriello had "assured me that her performance would improve and, if not, she would withdraw from the graduate school. There has not been any improvement" (Pa39). It is uncontradicted that a graduate student at this stage of the doctoral program cannot continue in the program without a faculty advisor and that Mauriello was aware of this requirement. It is also uncontradicted that Mauriello took no steps at this time to secure another faculty advisor and that no committee or individual at the University has the authority to compel a faculty member to serve as an advisor (Ja691-23, Ja 355-24 to Ja356-1, Ja360-20 to Ja361-1, Ja698-11, Ja650-17 to Ja651-7, Ja705-25, Ja702-16).

Instead of seeking another faculty advisor, Mauriello approached the chairman of the department's Graduate Committee, Dr. Rothstein, concerning her situation with Dr. Jansons (Pa39). The Graduate Committee serves as an advisory body to the Chairman of the Department but does not have the authority to appoint a faculty advisor (Ja698-12). Dr. Rothstein was given the impression by Mauriello that she was almost finished with her thesis. He agreed to convene the Committee in January, 1983 in an effort to mediate the dispute and, according to his testimony, advised Mauriello to bring data to the committee meeting to corroborate her statement that her

thesis was almost finished (Ja695-18 to Ja696-22). The precise instructions given to Mauriello as to what material she was to present at the meeting are disputed with Mauriello testifying that she was told to bring only data on the research errors she claimed had been corrected and on extraneous non-thesis research she had done in Jansons' laboratory (Pa39).

It is undisputed that Mauriello was not prepared to give a presentation of her thesis at the January meeting and that the Committee agreed to convene again on February 2, 1983 for the presentation (Pa39). It is further undisputed that the Committee then met with Dr. Jansons who described the nature of the errors committed by Mauriello and that, following this meeting, a tentative decision to dismiss plaintiff from the program was made pending her presentation before the Committee on February 2, 1983 (Pa40).

It is further undisputed that Mauriello appeared at the February 2, 1983 meeting unprepared to give the thesis presentation expected by the Committee (Pa40). Again, she testified that she had not been instructed to do so but rather to present non-thesis research she had accomplished. Since she did not have the requested material, the committee scheduled a third meeting (Pa40). Several days later, Mauriello admittedly contacted the chairman of the Department, Dr. di Mayorca, and told him that she would be unable to make the presentation because Jansons possessed much of her material (Pa40). Dr. Jansons, however, denied having any of Mauriello's material (Ja546-10 to 18). More importantly, it was inconceivable to Dr. di Mayorca that Mauriello did not have her data since graduate students normally possess several

copies of data from experiments they conduct and it is always the student's responsibility to maintain their research notebook (Pa40). Dr. di Mayorca advised the committee members that Mauriello was unable to produce the requested material and a majority of the Committee adopted the previously tentative decision to dismiss (Pa 40). On February 14, 1983 Dr. Rothstein, on behalf of the Committee, advised Mauriello that the Committee had notified the graduate school that she was no longer a Ph.D. candidate in the Department of Microbiology (Pa 40).

On June 9, 1983 Mauriello instituted suit in the Federal District Court of New Jersey pursuant to 42 U.S.C. §1983 asserting that her procedural and substantive due process rights had been violated. Following a jury verdict in Mauriello's favor, the district court judge entered an order on August 28, 1984 which, inter alia, directed the parties to agree on selection of an ad hoc committee to review Mauriello's thesis research material (Pa41). Respondents' motion for a stay of the injunctive order was denied by the district court on August 28, 1984 (Pa35). On September 28, 1984 respondents filed a Notice of Appeal and on October 12, 1984 petitioner filed a Notice of Cross Appeal from the judgment and order of the District Court (Ja1 to Ja4). While the matter was pending before the United States Court of Appeals for the Third Circuit, Mauriello made her presentation to the Ad Hoc Committee. After reviewing the material and her presentation, the Ad Hoc Committee rendered its unanimous decision on October 9, 1985 that Mauriello's research was "not of [sic] good scientific quality and Ph.D. caliber" (Pa41).

On appeal the Circuit Court reversed the judgment in favor of petitioner, holding that it was error to submit the case to the jury because petitioner's proof was insufficient to survive respondents' motion for a directed verdict. 781 F.2d 46 (3d Cir. 1986) (Pa45). Viewing all the facts in the light most favorable to petitioner, the court concluded that "under the applicable law [she] failed to present sufficient evidence to establish a claim" and accordingly the Circuit Court ordered judgment entered in favor of respondents (Pa45 to Pa46, Pa49).

While the appeal on the merits was pending before the Circuit Court, the District Court had entered an order on May 22, 1985 awarding Mauriello attorney's fees and costs in the total amount of $61,089.06 (Pa1 to Pa2). On June 11, 1985 Mauriello filed a notice of appeal and on June 14, 1985 respondents filed a notice of cross-appeal from the order awarding fees and costs (Pa26). On April 25, 1986 the Circuit Court reversed the order awarding fees, concluding that its reversal in the merits appeal rendered Mauriello a non-prevailing party for purposes of 42 U.S.C. §1988 (Pa26). On May 19, 1986 Mauriello filed a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit seeking review of the Circuit Court's reversal on the merits. 54 U.S.L.W. 3848 (July 24, 1986). On July 24, 1986 Mauriello filed the instant petition for writ of certiorari seeking review of the Circuit Court's reversal of the award of attorney's fees.

Summary of Argument

The writ sought herein should be denied because petitioner failed to demonstrate that the decision of the United States Court of Appeals for the Third Circuit is erroneous or conflicts with any holdings of this Court or any other circuit court of appeals. Rather, the decision of the Circuit Court that petitioner is not a prevailing party because the judgment and order in her favor at the trial level were erroneously entered correctly applied the governing law and is consistent with the holdings in other circuits. Petitioner did not achieve any significant relief as a result of this litigation and even if she had, she would not be entitled to attorney's fees since that relief was awarded under a mistake of law. Petitioner's claim that she is entitled to an award of fees because the judgment in her favor was reversed as a result of a change in the law is unsupported by case law or logic. Moreover, this contention is without merit since the relief she achieved was improperly ordered by the trial court in light of the then existing law. For these reasons, no basis exists for granting review of the writ of certiorari.

ARGUMENT

The writ should be denied because the decision of the United States Court of Appeals for the Third Circuit reversing the award of attorney's fees was correctly decided.

It is axiomatic that Congress intended fees to be awarded under 42 U.S.C. §1988 "only when a party has prevailed on the merits of at least some of his claims." *Hanrahan* v. *Hampton,* 446 U.S. 754, 758 (1980). "In order to be a 'prevailing party,' a plaintiff must have been entitled to some form of relief at the time suit was brought." *Harrington* v. *Vandalia-Butler Board of Education,* 585 F.2d 192, 197 (6th Cir. 1978), *cert. denied* 441 U.S. 932 (1979). Thus, in order to be entitled to attorney's fees "a party must establish in *an enduring way* that he or she was right on a matter in issue and that the litigation activities served to establish the existence of the right or contributed to an enjoyment of the right." *Smith* v. *University of North Carolina,* 632 F.2d 316, 346 (4th Cir. 1980) (emphasis added). A plaintiff who receives a favorable final judgment or order at the trial level which is reversed entirely on appeal cannot be viewed as establishing "in an enduring way" that he or she was right on a matter in issue. Rather, as held in *Harris* v. *Pirch,* 677 F.2d 681, 689 (8th Cir. 1982), a reversal of a judgment in favor of a plaintiff in a civil rights action completely negates an award of attorney's fees to the plaintiff since the plaintiff cannot be viewed as a "prevailing party." See also, *Lowman* v. *Davies,* 704 F.2d 1044, 1046 (8th Cir. 1983) (award of attorney's fees in civil rights action reversed after court of appeals reversed on the merits a judgment in favor of plaintiff).

Petitioner contends, however, that she is a prevailing party despite the appellate court's complete reversal of the judgment in her favor because she claims to have achieved the objectives of her litigation in the form of a hearing before the Ad Hoc Committee and because the reversal, according to petitioner, was based on a "change of law subsequent to the issuance of the permanent injunction" (Petition at page 7). Neither of these contentions has any merit and do not establish petitioner as a prevailing party entitled to attorney's fees.

While it is certainly true that a plaintiff need not prevail ultimately on every claim asserted or receive all the requested relief in order to be considered a prevailing party, it is just as true that prevailing party status cannot be claimed "by virtue of any success during the course of a civil rights case." *Doe* v. *Busbee,* 684 F.2d 1375, 1379-1380 (11th Cir. 1982). Contrary to her assertion, petitioner did not achieve the relief she sought in this litigation. In her complaint, petitioner did not even seek a hearing but rather demanded immediate reinstatement into the Ph.D. program, compensatory and punative damages and certain restraints against the individual defendants (Ja21 to Ja22). She has achieved none of this relief. Thus, this case is easily distinguished from *Bagby* v. *Beal,* 606 F.2d 411 (3d Cir. 1979), which petitioner erroneously contends is inconsistent with the Circuit Court's decision in this matter. In *Bagby,* the only relief sought by the plaintiff was a hearing. By the time the appeal was heard, the hearing had been completed and the court thus held the appeal to be moot. *Id.* at 415. Since the appeal was moot, thereby eliminating any decision on the merits, it was concluded that plaintiff had prevailed. *Ibid.* Unlike *Bagby,* in which no appellate decision

on the merits was rendered, the Circuit Court reached the merits in this case and held that the judgment and order in plaintiff's favor were legally erroneous.

Moreover, even if it is assumed that petitioner achieved some of the relief she sought in the form of the hearing before the Ad Hoc Committee she would nevertheless not be entitled to attorney's fees. Firstly, in order to be entitled to an award of fees a plaintiff must have "succeeded on the central issue, as exhibited by the fact that he has obtained the primary relief sought." *Taylor* v. *Sterrett,* 640 F.2d 663, 669 (5th Cir. 1981). The primary relief sought by petitioner was reinstatement to the program and damages and she did not obtain this relief. More importantly, the circuit courts which have decided the question at issue here "have concluded that where a plaintiff receives a favorable ruling on the merits of his claim, but that ruling is later vacated or reversed on the merits, the plaintiff is not entitled to attorney's fees as a prevailing party." *Doe* v. *Busbee, supra,* 684 F.2d at 1380; see *Frazier* v. *Bd. of Trustees of Northwest Miss.,* 765 F.2d 1278, on petition for reh'g, 777 F.2d 329 (5th Cir. 1985); *Lowman* v. *Davis, supra; Harris* v. *Pirch, supra; Smith* v. *University of North Carolina, supra; Harrington* v. *Vandalia-Butler Board of Education, supra.*

Fees have been denied in these cases even in instances where the plaintiffs had achieved some relief in the trial courts. *Doe* v. *Busbee, supra,* 684 F.2d at 1377-78; *Smith* v. *University of North Carolina, supra,* 632 F.2d at 352-53. For example, in *Doe* v. *Busbee, supra,* plaintiffs had obtained final injunctive and declaratory relief requiring Medicaid reimbursement for abortions. 684 F.2d at 1377. While the case was pending on appeal, this Court rendered two decisions which undercut the district court's

decision. The court of appeals remanded the case to the district court which vacated the final judgment and dismissed the complaint. However, the district court refused to vacate its prior award of attorney's fees, reasoning that plaintiffs had achieved substantial relief since during the interim period over 1800 women had received medicaid reimbursed abortions. *Id.* at 1381. On appeal, the Eleventh Circuit reversed the award of fees, holding that plaintiffs were not prevailing parties since they "ultimately did not prevail on a single legal issue in the case. . . . [t]heir successes were merely temporary, and any benefit flowing from their success in the district court was awarded under a mistake of law." *Ibid.* Similarly, any success achieved by petitioner in this matter "was awarded under a mistake of law" and she cannot therefore be considered a prevailing party.

Petitioner further suggests that she is entitled to fees because the judgment in her favor was reversed based on "an outcome-determination change of law subsequent to the issuance of the permanent injunction" (Petition at page 7). No case law support is cited for this proposition and the argument is directly at odds with the holding in *Doe* v. *Busbee, supra,* which denied fees even though the reversal on the merits was caused by intervening decisions of this Court. 684 F.2d at 1377. Moreover, the contention that the Court of Appeals' decision in this case was based on a "new legal pronouncement in *Ewing*" is misleading. Petitioner's claim to entitlement to fees is predicated on the relief she achieved in the form of a hearing. The hearing was ordered by the district court as a remedy for the preceived violation of petitioner's procedural due process rights. *Regents of the University of Michigan* v. *Ewing,* 474 U.S. ——, 88 L. Ed. 2d 523 (1985),

decided while the present matter was pending before the Court of Appeals, did not concern precedural due process rights but rather substantive due process rights of students facing academic dismissals. As to the procedural requirements in academic dismissals, this Court had determined long before petitioner's complaint had even been filed in 1983 that the type of formal hearing mandated by the district court is not a constitutional requirement. *Board of Curators, Univ. of Mo.* v. *Horowitz,* 435 U.S. 78 (1978). Thus, even if petitioner's argument had any merit, it would not apply to the facts of this case. Finally, as regards this argument, it cannot be said that this Court's decision in *Ewing* reflected a drastic or unanticipated change in law. Rather, the *Ewing* decision was clearly forecasted in this Court's opinion in *Horowitz* wherein it was emphasized that

> Courts are particularly ill-equipped to evaluate academic performance. The factors discussed [above] with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decision-making [435 U.S. at 92].

As is clear from the above discussion, the Court of Appeals correctly reversed the award of attorney's fees to petitioner. Moreover, petitioner's attempt to demonstrate a conflict among circuit court decisions sufficient to justify review by this Court is unconvincing and erroneous. The only case cited by petitioner to demonstrate a conflict is *Coalition for Basic Human Needs* v. *King,* 691 F.2d 597 (1st Cir. 1982). This decision by the First Circuit, however, involved a completely different factual setting than the instant case and those cited above. In *Coalition*

the plaintiffs obtained a preliminary injunction on appeal "that effectively determined the parties' rights," even though events then made it unnecessary for the injunction to ever take effect. 691 F.2d at 601. There never was, as in this case, a subsequent determination that the injunction was erroneously issued. Thus, the plaintiffs were deemed prevailing since they had established their "entitlement to some relief on the merits . . . on appeal." *Ibid.* (quoting *Hanrahan* v. *Hampton, supra,* 446 U.S. at 756-58). In contrast, petitioner has not shown any entitlement to relief on the merits of her claims.

Since the Third Circuit Court of Appeals correctly reversed the award of attorney's fees and that reversal is consistent with the holdings of the other circuits which have decided the issue there is no justification for seeking plenary review by this Court. As stated in *Smith* v. *University of North Carolina, supra,* the position advanced by petitioner

> would . . . requir[e] a defendant, who prevailed on the merits, to finance a plaintiff's unsuccessful claim against him. There is nothing in the statute to suggest that an innocent defendant should be assessed a portion of a plaintiff's litigation costs.
>
> Litigation is not without its financial risks. A fully successful defendant should not be required to reimburse an unsuccessful plaintiff for his legal gamble [632 F.2d at 353].

While public policy encourages vindication of constitutional rights, it does not require innocent defendants to pay for nonmeritorious claims of constitutional violations. Petitioner's attempt to have defendants finance her unsuccessful litigation against them should be rejected by this Court.

CONCLUSION

For the above stated reasons, it is respectfully submited that the petition for certiorari should be denied.

Respectfully submitted,

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